[redacted]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
GTE TELEPHONE OPERATING COMPANIES	)	Transmittal Nos. 874, 909,
Tariff F.C.C. No. 1	)	918
	)	CC Docket No. 94-81
Video Channel Service at	)	
Cerritos, California	)	
	)	

To: Chief, Common Carrier Bureau

SUPPLEMENTAL OPPOSITION
BY
APOLLO CABLEVISION, INC.

APOLLO CABLEVISION, INC.

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September 11, 1995

SUMMARY

That Transmittal No. 909/918 tariff is a patently unlawful effort to abrogate the parties' earlier Commission-approved long-term contracts for cable service in Cerritos is clearer now than it was when the predecessor Transmittal No. 874 was filed in 1994. Among other things, the Commission's January, 1995 decision in Competition in the Interstate Interexchange Marketplace, 77 R.R. 2d 253 (1995) reaffirmed the need for carriers to meet the "substantial cause" test when tariff changes to carrier/customer contracts are proposed. Mistakenly claiming its exemption from that requirement here, GTE Telephone has not even attempted a showing of "substantial cause" for the contract alterations the tariffs here would make.

That there are material differences between the GTE/Apollo agreements and Transmittal No. 874/908/918 is undeniable. The fact of GTE Service Corp.'s installation as a permanent competitor to Apollo defies GTE Telephone's contract obligation to make use of system Channels 40-78 available to Apollo at "reasonable market rent". GTE Service Corp.'s ability under tariff to use the bandwidth in the same ways as Apollo is at odds with non-competition agreements between Apollo and both the carrier and its affiliate. In these and other respects, earlier Commission-approved agreements are being unilaterally altered without even an effort at "substantial cause" demonstrations.

In addition to its exceeding any underlying Section 214 authority, Transmittal No. 874/909/918 is also unlawfully discriminatory. As to overall practices, Apollo has been subjected to limitations not applicable to GTE Service Corp. -- obvious and ironic differences, since it is Apollo, not the carrier's affiliate, which is the franchised cable operator in Cerritos.

Concerning rates, it is now clear that there is no "equivalence" in the lease charges to Apollo and GTE Service Corp. As demonstrated in an economic analysis transmitted herewith, the rates for both Apollo and GTE Service Corp. have been improperly calculated. Inappropriate costs have been included in the rate development, and their apportionment wrongly assigned as between Apollo and GTE Service Corp. In fact, the monthly charge to GTE Service Corp. should be either $94,422 or $105,956 per month, not the tariffed $81,764. Moreover, in either case, Apollo is owed a refund of $1,196,151.

Both this tariff and Transmittal No. 873/893 should be rejected as unlawful on their face, for reasons set forth herein, and earlier by the parties. If rejection is not ordered, modification of the Transmittal No. 874/909/918 is required. In addition to adjustment in the lease charges involved, qualifying provisions must be added to the current wording -- both to reflect contract limitations on the competitive activities of the carrier's affiliate in Cerritos, to reflect GTE Service Corp.'s lack of local franchise authority, and to conform the tariff to provisions dealing with similar matters applicable to Apollo in Transmittal No. 873/893.

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Apollo CableVision, Inc. ("Apollo"),a party to the captioned docket proceedings, by its attorneys and pursuant to the allowance of the Common Carrier Bureau's August 14, 1995 Supplemental Designation Order herein (DA 95-1796), submits herewith its opposition to the "Supplemental Direct Case of GTE," filed August 28, 1995.

INTRODUCTION

In its Order released July 14, 1994 in the captioned docket proceedings (DA 94-784) ("Cerritos Tariff Order"), the Common Carrier Bureau addressed two related tariff filings on behalf of GTE California, Incorporated ("GTE Telephone"). As the carrier itself announced in its filing, the tariffs were intended to abrogate earlier agreements among Apollo, GTE Telephone and its affiliate, GTE Service Corp., and to convert the earlier Commission-authorized use of cable distribution facilities in

Cerritos from a private contract arrangement to a tariffed common carrier service. Transmittal No. 873 proposed to establish a "video channel service" in Cerritos, and to govern Apollo's use of one half of the bandwidth on the Cerritos facilities; Transmittal No. 874 added GTE Service Corp. as the customer for the second half of the system bandwidth.

In the Cerritos Tariff Order, the Bureau suspended Transmittal No. 873 for one day, and initiated an investigation on a variety of legal and factual issues. In August and September of 1994, the parties filed pleadings addressed to the issues involved.

As to Transmittal No. 874, the Cerritos Tariff Order rejected that tariff, essentially because the Commission's earlier grant of Section 214 authority to GTE Telephone, and a corollary waiver of the statutory cable/telephone cross-ownership prohibition, had expired. Following the grant of a stay by the Ninth Circuit Court of Appeals, however, GTE Telephone resubmitted its Transmittal No. 874 on September 9, 1994 as Transmittal No. 909. On that same day, the Bureau released an Order (DA 94-988) suspending Transmittal No. 909 for one day and initiating an investigation, the specific issues of which were to be included "in a future Order."

No further action on any of the GTE Telephone tariffs involved here was taken by the Bureau for eleven months.

In its August 14, 1995 Supplemental Designation Order, the Bureau addressed Transmittal No. 909 (which had been subsequently

modified by Transmittal No. 918), designating the following issue in addition to those enumerated in the Cerritos Tariff Order: "Are the rates and terms proposed in Transmittal No. 909 reasonable?"

On August 28, 1995, GTE Telephone filed a "Supplemental Direct Case of GTE," asserting the Transmittal No. 909/918 changes to be "reasonable, cost-based, and nondiscriminatory." A virtually verbatim repetition of its Transmittal No. 874 "Description and Justification"materials and 1994 pleadings, the carrier's Supplemental Direct Case recites its process of converting the prior real-world financial facts into a tariff-charge justification. GTE Telephone concludes that there is no "disparity in charges between the two customers of the Cerritos broadband network," and that the tariff charges to GTE Service Corp. under Transmittal No. 874/909/918 are "lawful and nondiscriminatory."

DISCUSSION

I. Earlier Legal Arguments Demonstrating The Impropriety of GTE Telephone's Tariffs Have Been Reinforced During The Past Year

In its May 17, 1994 "Petition to Reject or Suspend Tariffs" herein, Apollo argued that both Transmittal Nos. 873 and 874 should be rejected as inconsistent with the parties' prior Commission-approved agreements. Cited in support were the so-called Sierra-Mobile line of cases, and Commission precedent requiring carriers to show "substantial cause" for departing in filed tariffs from earlier long-term contract arrangements with customers. ("Petition to Reject or Suspend Tariffs," May 17, 1994, pp. 7-13). For its part, GTE Telephone argued that the so-called "Armour Packing rule" precluded any consideration of contract relationships between the parties in judging the propriety of its tariff filings here.[1/] What ensued was a comprehensive debate on the extent of legal limits on GTE Telephone's ability to use the Commission's tariff processes to abrogate its contracts with Apollo.[2/]

1/ "Consolidated Reply to Petitions to Reject or Suspend Tariffs," June 1, 1994, pp. 11-14.

2/ Letter from Edward P. Taptich, Esq. to A. Richard Metzger, Jr., June 29, 1994, pp. 4-6; Letter from James S. Blaszak, Esq. to David Nall, July 8, 1994, Memorandum, pp. 10-22; "Brief on Behalf of Apollo CableVision, Inc.," August 15, 1994, pp. 25-38; "Opposition to Direct Case on Behalf of Apollo CableVision, Inc.," September 15, 1994, pp. 3-22; "Comments of GTE," September 15, 1994, pp. 6-12; "Reply Comments on Behalf of Apollo Cablevision, Inc.," September 30, 1994, pp. 3-9; "GTE Rebuttal to Opposition and Reply Comments," September 30, 1994, pp. 9-16.

Apollo will not here repeat arguments presented earlier. At least one Commission ruling since the parties' last presentations on the subject, however, is worthy of note.

In a decision on reconsideration in CC Docket No. 90-132, Competition in the Interstate Interexchange Marketplace, 77 R.R. 2d 253 (1995), the Commission directly supported Apollo's position that, where a tariff filing proposes material changes to an earlier long-term carrier/customer contract, the "just and reasonable" standard of tariff review under Section 201(b) of the Act requires the filing carrier to meet the "substantial cause" test:

> In the RCA American Decisions, we recognized that a dominant carrier's proposal "to modify extensively a long-term service tariff may present significant issues of reasonableness under Section 201(b) that are not ordinarily raised in other tariff filings." Accordingly, we held that a dominant carrier's tariff revisions altering material terms and conditions of a long-term service tariff will be considered reasonable only if the carrier can make a showing of substantial cause for the revisions. In the Interexchange Order [6 F.C.C. Rcd 5880 (1991(], we cited the RCA American Decisions as holding that the "substantial cause" test applies to tariff revisions that alter material terms and conditions of a long-term contract. We now affirm the applicability of the substantial cause test . . . .

77 R.R. 2d at 259. (Footnote omitted).[3/] Contrary to GTE Telephone's earlier contention that the substantial cause test applies only to revisions of earlier filed tariffs, not initial

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[3/] The Commission extended the substantial cause test to non-dominant, as well as dominant, carriers. Id. at 259, n. 51.

tariff filings, the Commission also made clear that the test applies as well "to initial review of [the carrier's] tariffs". Id. at 259, n. 50.

The Commission's reasons for its approach were practical and clear, and are directly relevant here:

> In applying the substantial cause test to [a carrier's] contract-based tariff modifications, we will consider that the original tariff terms were the product of negotiation and mutual agreement. We believe that the fact that [the carrier] and the customer chose to do business via a contract-based tariff and not a generic tariff should carry certain consequences. As we observed in the Notice of Proposed Rulemaking in this proceeding, one benefit of contract carriage is that it can facilitate planning by both users and IXCs through greater availability of long-term commitments and price protection. This benefit would be reduced if [the carrier] was unilaterally able to alter material terms of their contracts.

77 R.R.2d at 259. Given these considerations, the Commission deemed it "unlikely" that "a material change to a contract-based tariff [would] meet[] the substantial cause test". Id.

As Apollo has shown earlier, GTE Telephone has not even attempted a substantial cause showing here. The Commission's decision in CC Docket No. 90-132 merely reinforces the necessity to reject the tariffs for that reason alone.

II. There Are Indeed Significant Disparities Between The Apollo/GTE Agreements And Transmittal No. 874/909/918 Which Require a "Substantial Cause" Showing

In its prior pleadings herein, Apollo has detailed the ways in which the provisions of Transmittal No. 873/893 differ from the parties' agreements. (See, e.g., Brief on Behalf of Apollo CableVision, Inc., August 15, 1994, pp. 2-10.) Transmittal No. 874/909/918 simply extends all of the general provisions in Transmittal No. 873/893 to GTE Service Corp. as the second customer, and specifies the charges to be applied to that entity. As a result, all of Apollo's earlier discussion of contract/tariff differences is pertinent here; GTE Service Corp. was an integral part of the parties' overall business arrangements, working lockstep with the carrier in forging and implementing the operational structure agreed on in Cerritos.

A. Transmittal No. 874/909/918 Conflicts With Apollo's Right to Use of the Bandwidth Now Being Tariffed to GTE Service Corp.

With specific reference to the tariff wording Transmittal No. 874/909/918 would add to Transmittal No. 873/874, at least two particular departures from earlier agreements are immediately evident. First, the very fact that the carrier proposes to install GTE Service Corp. as a permanent occupant of one-half of the system bandwidth contradicts the most basic contractual understanding of the parties. As explained in detail in earlier pleadings, Apollo agreed to a 15-year lease of one-half of the system bandwidth; the remaining half was temporarily reserved for

GTE Service Corp.'s experimentation. From the very inception of their venture in Cerritos, the parties contemplated that at the conclusion of the experimental period (ultimately, at the end of the 5-year period approved by the Commission), GTE Service Corp.'s half of the bandwidth would be made available to Apollo "at the then reasonable market rent for such bandwidth."[4/] Consistent with that understanding, GTE notified Apollo as follows in June of 1993:

> Pursuant to Paragraph 21 of the Lease Agreement between Apollo CableVision, Inc. ("Apollo") and General Telephone Company of California ("GTECA"), as amended by Amendment No. 2 thereto, Apollo has a right-of-first-refusal to the use of the bandwidth capacity in excess of 275 MHz, in the event that such capacity becomes available. . . .
>
> . . . GTE has reviewed the status of the Cerritos test bed and has decided not to try to pursue additional experimental activities. Therefore, GTESC will not continue full usage of its bandwidth capacity after the expiration of the waiver grant, for testing or for any other purpose for which permission for a waiver extension from the FCC would be required.
>
> As a result, 275 MHz of broadband capacity (on the same combination of coaxial and fiber facilities through which Cerritos customers are currently served) will become available to GTECA in 1994, no later than July. Apollo CableVision, Inc. is hereby offered the right-of-first-refusal to use this capacity, upon its availability and pursuant to a

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4/ See the GTE Telephone/Apollo "Lease Agreement" dated January 22, 1987, ¶ 21, as amended June 19, 1989 (Atttachments 8, 10 to the Brief on Behalf of Apollo CableVision, Inc. August 15, 1994. See also, e.g., "Reply of General Telephone Company of California," W-P-C-5927, filed August 18, 1987, p. 6 ("The parties' intent was to allow for the transfer to Apollo of bandwidth no longer needed by GTE in its research and testing.").

> channel service tariff rate of $95,265 per month.[5]

Apollo exercised its right to accede to use of the bandwidth, but disputed $95,265 as the "reasonable market rent." GTE Telephone refused to deal further with Apollo on the matter, and changed its business plans in light of then-new court decisions concerning the Commission's cable/telephone cross-ownership limitations.

Instead of meeting its contract obligation to afford use of the second half of the system bandwidth to Apollo at "reasonable market rent," GTE Telephone sought instead to make permanent, through the Commission's tariff processes, a division of the system's channels. The basic effect of Transmittal No. 874/909/918, therefore -- the denial of Apollo's access to the second half of the system bandwidth by tariffing it to GTE Service Corp. -- is a direct breach of the parties' agreements, and the most basic deal term, from Apollo's standpoint.

B. The Tariff Conflicts With Contract Non-Competition Provisions

The 1989 Amendment 2 to the Lease Agreement between Apollo and GTE Telephone contained the following provision:

> 7.(a) GTEC agrees not to compete with Apollo, or any permitted successor or assignee, in the provision of Video Programming in the City during the term of the base (including any extensions thereof not in excess of seven (7) years beyond the initial term).

[5] Letter dated June 29, 1993 from R.A. Cecil, GTE Telephone Operations, to Thomas Robak, Apollo CableVision. The parties thereafter began negotiations over an appropriate charge for the additional bandwidth.

(b) Provided, however, that GTEC shall not be prevented by subsection (a) from complying, as a carrier, with any access obligation to video programs imposed on it by the FCC, with regulatory bodies, or the courts.

Acknowledging the fact and importance of the agreement terms, GTE Telephone's Transmittal No. 873 included the following at Section 18.4(a)(3) of the proposed tariff:

> Telephone Company shall not compete with Apollo CableVision, or any permitted successor or assignee, in the provision of Video Programming in Cerritos during the term of this tariff (including any extensions thereof not in excess of seven (7) years beyond the initial term). Provided however that the Telephone Company shall not be prevented by this provision from complying, as a carrier, with any access obligations to video programmers imposed on it by the FCC, other regulatory bodies, or the courts.

GTE Service Corp. similarly agreed with Apollo at paragraph 2(d) of the "Enhanced Capability Decoder (Converter Box) Agreement" executed November 16, 1989 (Attachment 14 to the "Brief on Behalf of Apollo CableVision, Inc.):

> GTESC agrees not to compete with Apollo, or any permitted successor or assignee, in the provision of Video Programming, as that phrase is used in the Cable Communications Policy Act of 1984, in the City of Cerritos during the term of the Lease Agreement dated January 22, 1987, as amended, between GTE California Incorporated and Apollo (including any extension thereof not in excess of sever (7) years beyond the initial term), provided, however, that GTESC or any other GTE entity shall not be prevented by this provision from complying with any obligation imposed on GTE by the FCC, other regulatory bodies or the courts, including but not limited to, Near Video On Demand, Video On Demand or other advanced forms of programming which may

> become available as a result of technological advances.

Transmittal No. 874/909/918, however, contains no comparable provision. Moreover, Sections 18.1, 18.2 and 18.3 of Transmittal No. 873/893, which establish Apollo's permissible use of the Cerritos system, are extended equally to GTE Service Corp. under Transmittal No. 874/909/918 -- a result squarely at odds with those parties' non-competition agreement.

GTE Telephone's only response on this point has been that "any [Apollo] agreements with Service Corp. are . . . irrelevant to this investigation."[6/] The carrier is wrong. GTE Service Corp.'s non-competition agreement was a quid pro quo for Apollo's willingness to cede its then-control over supply and installation of customer equipment to GTE Telephone, and to cooperate in GTE's Service Corp.'s preference for different kinds of converter boxes. In fact, Apollo was induced by GTE Telephone to agree to the new arrangement with its affiliate (see, e.g., Amendment 2 to the Apollo/GTE Telephone Lease Agreement, recitals B-F, and ¶ 2). Moreover, two other agreements dealing with the same subject matter were executed simultaneously with the "Enhanced Capability Decoder (Converter Box) Agreement" -- an "Agreement For the Installation of Customer Provisions CATV Equipment" (dealing with GTE Telephone's altered role concerning supply and installation of converter box equipment in Cerritos)(see Attachment 6 to Apollo's August 15, 1994 Brief), and a "Service Agreement"

[6/] Comments of GTE, filed September 15, 1994, p. 31.

between Apollo and GTE Service Corp. designed, in part, to ameliorate some of the competitive effects GTE Service Corp.'s offerings was already having on Apollo's services (Attachment 12 to Apollo's August 15, 1994 Brief, at ¶ 11).

All of these agreements were interrelated and interdependent, and Apollo relied on each of them -- and on GTE Telephone's participation -- in executing the others. The carrier can hardly now pretend it had no knowledge of -- and has no current responsibility for -- GTE Service Corp.'s non-competition agreement.

That GTE Telephone and GTE Service Corp. are attempting to establish the latter as a competitor to Apollo in Cerritos is readily demonstrable. As shown by Apollo earlier,[7/] since July 1994, GTE Service Corp. has undertaken to pay franchise fees relating to its Center Screen Services directly to the City, and has orally requested that the City grant it a discrete operating franchise. For its part, the City has simply held GTE Service Corp.'s payments and has deferred consideration of its request for a franchise. Attached is a copy of a February 1995 exchange of correspondence between GTE Service Corp. and the City of Cerritos reflecting those events. (Attachment 1)[8/]

[7/] Letter from Edward P. Taptich, Esq. To Kathleen M.H. Wallman, dated June 12, 1995.

[8/] In its Supplemental Designation Order (¶ 15), the Bureau indicated its belief that the pending proceeding relating to the requested decertification of Cerritos to regulate Apollo's cable rates might be "instructive" on whether GTE Telephone "is acting in a manner inconsistent with the agreement not to compete with Apollo." For that reason, the Bureau found it unnecessary to seek further information in that regard. Id.

Footnote Continued on Next Page

III. Transmittal No. 874/909/918 Unlawfully Exceeds The Scope of Both Prior and Requested Section 214 Authority

It is axiomatic that tariffs filed for common carrier services for which Section 214 authority has not been granted are patently unlawful. A corollary expression of that principle is that tariffs may be no broader than the Section 214 certification on which they are based. In this case, Transmittal No. 874/909/918 exceeds GTE Telephone's Section 214 authority -- either the experimental authority granted by the Commission in 1989, the temporary authority granted by the Bureau in August of this year, or that contemplated by GTE's pending application (W-P-C 7097).

Initially, the Commission granted GTE Telephone authority to construct the Cerritos facilities, and to provide service over those facilities both to Apollo and to GTE Service Corp. Apollo would be the franchised cable operator in Cerritos. GTE Service Corp. would provide "experimental" NVOD and VOD services -- what eventuated as Center Screen (28 channels of pay-per-view movies;

A Bureau ruling that Apollo faces "effective competition" from GTE Service Corp. in Cerritos may be one factor to be taken into account in judging the consistency of GTE's conduct with its agreements with Apollo. However, it will not be conclusive. "Effective Competition" at issue in the decertification proceeding is a term not found in the 1992 Cable Act, 47 U.S.C. § 543(a)(2), and defined in Section 76.905(b)(2) of the Commission's Rules. It is not co-extensive withthe broader contract obligations. While the decertification ruling may provide soe general background, a determination of GTE Telephone's tariff departures from its contract non-compete provisions will not be dictated by the result in the Cerritos decertification proceeding.

currently fewer than 20 orders per day) and Main Street (Prodigy-like interactive services; currently fewer than 200 subscribers).

Since the expiration of GTE's cross-ownership waiver and Section 214 authority in July of 1994, the carrier has stressed that it simply intends to continue its earlier authorized activities.[9] Most recently, GTE Telephone's pending Section 214 application -- which would be the after-the-fact basis for the Transmittal No. 874/909/918 -- states the following:

> A grant of this Application is in the public interest in that it would enable GTECA to continue to provide video channel service over its existing broadband network to Service Corp., thereby ensuring the continued provision of Center Screen and GTE Mainstreet services. These services have been available to the residents of Cerritos since the inception of the Cerritos project in 1989. . . .
>
> GTE has documented the development and ongoing success of Center Screen and GTE Mainstreet in reports submitted to the Commission since 1989. See e.g., 1993 Report on Cerritos, submitted to Domestic Facilities Division, Common Carrier Bureau, March 30, 1994. Therefore, a grant of this application will insure that Cerritos subscribers will continue to have access to video services that they have enjoyed for years.

Application of GTE California Incorporated, W-P-C-7097, filed July 28, 1995, at pp. 4-5 (emphasis added).

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[9] See, e.g., Supplemental Designation Order, ¶8:

> In Transmittal 874, GTECA proposed to provide channel services to its affiliate, Service Corp., which would permit Service Corp. to continue to provide video-on-demand service to subscribers in Cerritos. [Emphasis added].

The current wording of the tariff, however, would permit GTE Service Corp. to utilize the leased facilities to provide a host of services beyond those authorized in 1989, and which the pending Section 214 application purports simply to extend. Accordingly, for lack of required Section 214 authority (which has not yet been granted, even on an interim basis, for other than GTE Service Corp.'s NVOD/VOD experimentation),[10] the tariff must be rejected.

IV. The Proposed Rates For GTE Service Corp. Are Discriminatory

In its Supplemental Designation Order, the Bureau discussed earlier arguments by the parties that, even assuming a tariffing of the service were proper, the proposed tariff charges were unreasonable and discriminatory. The Bureau observed that tariff rates for Apollo and GTE Service Corp. should be "equivalent," noted that questions concerning the propriety of the interest rate used by the carrier existed, and directed the carrier to demonstrate the reasonableness of the Transmittal No. 909 rates.[11]

10/ See The Bureau's August 14, 1995 Order herein (DA 95-1796):

> [We] hereby grant GTDC temporary authority to continue to provide video channel service to Service Corp. while its application for permanent Section 214 authorization is pending.

11/ Apollo has argued, above and elsewhere, that the tariffing of half of the Cerritos bandwidth to GTE Service Corp. is a breach of GTE Telephone's central obligation to make that bandwidth available to Apollo at "reasonable market rent." The Supplemental Designation Order (¶¶ 11, 16) suggests that if the Transmittal No. 874/909/918 rate is deficient under FCC rate-making

Footnote Continued on Next Page

In evaluating the carrier's Supplemental Direct Case presentation, certain background facts should be borne in mind. For example, during these proceedings, GTE Telephone has been at pains to stress that, with respect to bandwidth lease arrangements, it has always dealt with its affiliate in the same way as it has with Apollo. Last year, for example, the carrier stated it had entered into comparable lease agreements in 1987.[12/] In GTE Telephone's Supplemental Direct Case (p. 4), it is said that "private contractual [lease] arrangements" with GTE Service

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principles, but is corrected in some fashion, the resulting tariff charge might represent "reasonable market rent" under the parties' contract.

Apollo has never taken such a position, and believes any such conclusion by the Commission would be both an overreaching interpretation of a private contract, and grossly mistaken as a real-world matter. The contract "reasonable market rent" assumed a non-regulated environment, and a determination based on usual marketplace influences. It did not arrogate to GTE Telephone an ability to arbitrarily tally its expenses (real or imagined, direct or indirect), apply a guaranteed rate of return factor, and announce some mathematical result because its affiliate stated a willingness to pay that amount. What was contemplated was what a willing, arms-length cable entrepreneur would pay for the bandwidth involved.

Apollo does not here argue that some adjustment of the Transmittal No. 874/909/918 charges to GTE Service Corp., according to ratemaking notions, would yield a "reasonable market rent" contract figure. Apollo's earlier submission to the Bureau argued only that the extraordinary ambiguity between GTE Service Corp.'s monthly revenues ($2,850) and the tariff charges ($81,764) was evidence that the carrier-affiliate arrangement was collusive and anticompetitive:

> This startling disparity . . . raises serious prima facie questions whether any rational economic basis for the tariff lease charge to GTE Service exists, or whether it is simply a collusively arrived-at figure to keep GTE Service Corp. in the market, and to prevent Apollo's exercising its contract right to the second half of the system bandwidth at a "then reasonable market rent."

Letter from Edward P. Taptich, Esq. to Kathleen M.H. Wallman dated June 12, 1995, p. 2. Determinations of what "then reasonable market rent" was in 1993 are matters for the California civil courts, not this agency.

12/ See, e.g., GTE Telephone's "Application for Review," July 26, 1994, p. 2.

Corp. were reached in 1991. Other GTE documents, however, indicate that lease agreements between GTE Telephone and GTE Service Corp. had not yet been finalized even in December 1992.[13/]

With respect to the financial equivalence of the Apollo and GTE Service Corp. arrangements at any point, questions also exist. Internal GTE documents recently obtained in the California civil proceedings indicate that at least in the early planning stages, it was being considered that GTE Telephone would "recover costs for the project, but not a profit" from GTE Service Corp., and that the cost of debt for the affiliate would be 8-1/2% -- less than half the 18.9% required by Apollo.[14/]

Other GTE documents further indicate the need for care in accepting generalized assertions of a proper rate determination here. Prior to the Commission's 1989 approval of the Cerritos project, the carrier related its understanding that its investments in Cerritos were wholly at risk as a competitive venture. Yet even at that time, the carrier was already formulating plans "to justify the shift of costs incurred on the Cerritos project from BTL [below-the-line] to ATL [above-the-line] operations." (See Attachment 4.) The "target audience" for this effort was to be "the regulators, including the Commission." Id.

Against this background, the carrier's generalized assurances of non-discriminatory rates and rate development must

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13/ See Attachment 2, p. 3.

14/ See Attachment 3

be carefully scrutinized. And as demonstrated below, a close review confirms the lease charges in Transmittal No. 874/909/918 are indeed improperly derived and discriminatory.

Appended hereto as Attachment 5 is an economic analysis of the Transmittal No. 874/909/918 lease rate by Montgomery Consulting. The relationship between that charge and the comparable Transmittal No. 873/893 charge to Apollo is also examined. The Montgomery Consulting analysis demonstrates that, contrary to GTE Telephone's claims, the Transmittal No. 874/909/918 charge to GTE Service Corp. is not based on standard methodologies, is improperly arrived at, and that the tariff rates for Apollo and GTE Service Corp. Favor the latter. As summarized at page two of the study:

> The tariff charges for Apollo are not developed appropriately, either with respect to the specific cost characteristics identified by GTE or in comparison to other GTE ratemaking for video transport services. First, GTECA included in Apollo's lump sum tariff rate certain "nonrecoverable" costs that apparently recover (a) plant costs that will not be depreciated by the end of the service period, and (b) costs that were not transferred to actual regulated costs. A customer of service under tariff, such as Apollo, would not bear such costs under standard ratemaking practices. Second, GTECA used annual charge factors for administration and maintenance overheads that do not reflect GTECA's essentially-passive role with respect to channels operated by Apollo. Due to GTECA's effort to structure the tariff lump charge to the amount that Apollo had previously paid under contract, Apollo, in its status as simply a customer for a GTECA tariff service, is forced to bear inappropriate costs. That the rate for GTESC is ostensibly set on the same basis as the cost to Apollo does to cure the underlying discrimination in rates. GTESC, in fact,

should bear part of the costs that were improperly allocated to Apollo by virtue of GTECA's rate averaging.

Based on a proper application of ratemaking elements, and in order to establish an equivalence between lease charges to Apollo and GTE Service Corp., the Montgomery Study demonstrates that the Transmittal No. 874/909/918 lease charge to GTE Service Corp. should be $94,422 per month, while a refund to Apollo of $1,196,151 is due. Alternatively, if the inappropriate costs factors GTE Telephone has apportioned between Apollo and GTE Service Corp. are permitted nonetheless, Apollo is still due the refund amount identified, and the "equivalent" monthly charge to GTE Service Corp. should be $105,956, not the $81,764 contained in Transmittal No. 874/909/918.

In their present form, and in their current amounts, the tariff lease charges are discriminatory and unlawful. Even ignoring their other legal deficiencies, the tariffs must be rejected on this basis.

V. The Carrier's Tariff Arrangement With Its Affiliate is Collusive and Anticompetitive

In its May 17, 1994 rejection petition (at pp. 24-25 and Attachment 3), Apollo identified various specific facilities elements commonly required by Apollo and GTE Service, and as to which GTE Telephone could arbitrarily favor its affiliate.[15/] In

[15/] The carrier never challenged Apollo's facts, offering only a general assertion it "will not favor any one customer over another." GTE Consolidated Reply, June 1, 1994, p. 28.

subsequent filings, Apollo further pointed out that, since the tie of GTE's take-over of system operations in June and July of 1994, problems in the conduct of Apollo's business have arisen as a direct result of GTE Telephone's withdrawing from Apollo -- and then conveying to GTE Service Corp. -- certain operational controls.[16/]

With respect to Apollo's proprietary customer information required under Section 18.3.3(G) of Transmittal No. 873/893, Apollo has pointed out GTE Telephone's direct rejection of Apollo's request that such information be kept confidential from GTE Service Corp.[17/] And today, among other things, the carrier automatically notifies GTE Service Corp. of any new Apollo customer hook-up (see Attachment 6), which new customer is then solicited by GTE Service Corp. -- thus appropriating to itself the benefit of Apollo's marketing efforts and expenses. The Commission would tolerate no such carrier/affiliate conduct in other services, and it should not permit it in Cerritos.

Apollo is aware of the Bureau's observation that the "reasonableness of a tariff is generally not related to the customer's usage of that service." (Supplemental Designation Order ¶ 26). In this case, however, fictions of separation and

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16/ While the carrier contested certain of Apollo's assertions in these respects, its responses are partial and unsupported. See Apollo's September 30, 1994 Reply Comments, pp. 22-24.

17/ See Apollo's September 30 Reply Comments, p. 28. As reported in Apollo counsel's October 4, 1994 letter to the Bureau (at fn. 4), at a June 29, 1994 meeting with Apollo, GTE's Mr. R.D. Wright stated that GTE Telephone and GTE Service were "one company," and that no information given GTE Telephone by Apollo would be withheld from GTE Service.

arms-length dealings must give way to the reality of the GTE Telephone/GTE Service Corp. concert of activity in Cerritos. As shown elsewhere, the charges by the carrier to its affiliate are an obvious commercial sham. GTE Service Corp.'s attempted franchise fee payment (see Attachment E) confirms that gross receipts for its Center Screen service have been approximately $2,850 per month. At the same time, the monthly lease charge to the GTE Service Corp. under Transmittal No. 909 is $81,764 -- more than 25 times monthly service revenues.[18/] This startling disparity raises serious prima facie questions whether any rational economic basis for the tariff lease charge to GTE Service Corp. exists, or whether it is simply a collusively arrived-at figure to keep GTE Service Corp. in the Cerritos market, and to prevent Apollo's exercising its contract right to the second half of the system bandwidth at a "then reasonable market rent." Under its obligation to take anticompetitive considerations into account when reviewing tariff filings, the Commission cannot simply ignore such plainly inexplicable commercial conduct.

18/ GTE Service Corp.'s letter shows $213.05 to represent 2-1/2% of gross receipts for the 4th quarter of 1994. Extrapolating, gross receipts were therefore $8,522 for three months, or $2,841 per month.

VI. If Not Rejected Outright, Transmittal No. 874/ 909/918 Must Be Modified To Reflect The Parties' Contract Terms

A. Apollo's First Refusal Rights

As noted above, the Lease Agreement between GTE Telephone and Apollo includes a provision whereby Apollo is entitled to acquire use of the additional 39 channels at "reasonable market rent" when that bandwidth "becomes available." To be sure, in the current civil litigation, the parties are in disagreement over Apollo's entitlement to the bandwidth at this time: Apollo contends it "became available" in 1993, and the only unresolved question is the amount of "market rent"; GTE contends it withdrew its 1993 offer to lease the channels to Apollo before it was accepted. However, the parties are at least in agreement that the Apollo has an indisputable right to acquire use of the bandwidth before it is conveyed to any party other than GTE Service Corp.[19/]

If the tariff is not rejected, therefore, Section 18.4.1(B) should, at a minimum, be modified to reflect this omitted contract term -- just as Section 18.4(A), which deals with channels through 39, reflects such a contract term vis-a-vis the carrier. Apollo suggests the following wording:

19/ See, e.g., GTE California Incorporated v. FCC, No. 93-70924 (9th Circuit), Petitioner's Reply in Support of the Motion for a Stay Pending Judicial Review, filed September 6, 1994, p. 11 ("Apollo has a right of first refusal to acquire use of the Channels before they are sold to anyone else . . . [emphasis added]).